Richmond Waterfront Terminals, Inc. and Terminal Stevedores, Inc. *and* International Longshoremen's Association, AFL–CIO (ILA), Petitioner. Case 5–RC–10961

December 16, 1982

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND HUNTER

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objection to an election[1] held on March 12 and 13, 1980, and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations, as modified herein.

In his Report on Objections, the Regional Director recommended that the election be set aside based on his finding that the execution of a contract by the Employer and the Intervenor[2] while an election petition was pending contravened Board law as set forth in *Midwest Piping and Supply Co., Inc.*,[3] and succeeding cases. We agree with the Regional Director's recommendation that the election be set aside for the reasons set forth below.

The facts in brief are as follows: An election pursuant to the petition herein was originally scheduled for October 17 and 18, 1979. On October 10, 1979, the Regional Director dismissed the petition on the ground that the Petitioner appeared to lack the requisite showing of interest. On October 22, 1979, the Petitioner served the Board and the parties with copies of its request for review of the dismissal of the petition. Subsequently, on October 23, 1979, the members of the Intervenor, the incumbent union, ratified a new collective-bargaining agreement which was executed by the Employer and the Intervenor on October 26, 1979, and was to be effective from November 1, 1979, to November 1, 1982. The petition was reinstated by direction of the Board dated January 15, 1980, and remanded to the Regional Director for further processing.

By letter dated March 3, 1980, the Employer advised the employees as follows:

> As you know, last September a petition was filed with the N.L.R.B. to have an election in October to determine whether the Teamsters or the I.L.A. would represent the employees of Richmond Waterfront Terminals, Inc.
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> On October 10, 1978, the N.L.R.B. dismissed the petition because the I.L.A. could not produce cards to satisfy the N.L.R.B. 30% showing of interest requirement. After we received the notice of dismissal, we sat down with the Teamsters and negotiated, in good faith, what I felt was an excellent contract which was then ratified by the employees. Even though this has been very costly to the company, we have lived up to our end of the agreement.
>
> Now, some months into the new contract, the N.L.R.B. through the prodding of the I.L.A., has reversed itself and directed an election.
>
> Since circumstances have changed, we have no alternative but to cease to enforce the contract that went into effect on November 1, 1979 and effective Monday, March 10, 1980 we will revert to the old pay scale under the previous contract . . . .

Prior to the election the Employer reverted to the wage scale of the pre-November 1, 1979, contract. The election was held on March 12 and 13, 1980.

In our recent decision in *RCA Del Caribe, Inc.*,[4] we discussed at length the Board's so-called *Midwest Piping* doctrine. A Board majority concluded that, contrary to that doctrine, an employer will not be required or permitted to withdraw from bargaining with an incumbent union after a petition by a rival union has been filed.[5] Thus, an employer will not violate Section 8(a)(2) of the Act or engage in objectionable conduct sufficient to set an election aside by engaging in post-petition negotiations or the execution of a contract with an incumbent union. The Board majority further found that an employer would violate Section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition had been filed by an outside union. The Board majority thus concluded that this approach afforded maximum protection to the complementary statutory policies of furthering stability

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 1 for the Petitioner, 36 for the Intervenor, and 2 against the participating labor organizations; there were 2 challenged ballots, an insufficient number to affect the results.

[2] Warehouse Employees Union, Local No. 322, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, appeared as the Intervenor in this proceeding.

[3] 63 NLRB 1060 (1945).

[4] 262 NLRB 963 (1982).

[5] Member Jenkins dissented from this holding in *RCA Del Caribe*. He would adhere with some modifications, to the sound and time-honored *Midwest Piping* doctrine, which the Regional Director properly found controlling herein.

in industrial relations and of insuring employee free choice.

Consistent with the view expressed in *RCA Del Caribe, supra*, we find that the Employer did not engage in objectionable conduct when it signed and implemented the collective-bargaining agreement with the incumbent union. However, its rescission of the contract within 10 days prior to the election, in light of the above, constituted objectionable conduct and requires setting the election aside.[6] Accordingly, a second election shall be directed.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

[6] Member Jenkins would set aside the election for the reasons stated by the Regional Director. See fn. 5, *supra*. Members Fanning and Jenkins also find that the letter from the Employer advising the employees of its rescission of the contract, and placing the onus on the Petitioner for the resulting reductions of wage rates, in itself constituted coercive conduct sufficient to warrant setting the election aside.